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August 18, 2000

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket No. 97-21
CC Docket No. 96-45

Dear Ms. Salas:

On Thursday, August 17, Lawrence R. Krevor, Senior Director of Government Affairs for Nextel Communications Inc. ("Nextel"), Laura Holloway, Director of Government Affairs, Danielle Brown, Nextel's Education Program Manager, and Laura H. Phillips, counsel for Nextel, met with Anna Gomez, Senior Legal Advisor to Chairman Kennard, regarding the Commission's October 8, 1999 order on reversing e-rate discounts and the pending Petitions for Reconsideration filed on that order.

During the meeting, we discussed the scope of Nextel's participation in the Schools and Libraries Program and positive response schools have had to Nextel's services. We also covered the impact the Commission's October 8, 1999 order has on the perceived business risks by carriers participating as vendors in the program and the disincentives it creates for carriers to provide internal resources to support the program. Nextel explained its concern that mistakes or unannounced changes in processing policies by the e-rate Program's administrator not become the responsibility of the carrier-vendors. Nextel's comments supporting Petitions for Reconsideration of the order were provided to Ms. Gomez at the meeting and are attached to this filing.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter and attachment are being submitted to the Secretary's office and a copy is being provided to Ms. Gomez. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,

Laura H. Phillips
Counsel for Nextel Communications, Inc.

cc(w/o encl.): Anna Gomez

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Changes to the Board of	)	
Directors of the National Exchange	)	CC Docket No. 97-21
Carrier Association, Inc.	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

COMMENTS SUPPORTING PETITIONS FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

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Its Attorneys

August 3, 2000

SUMMARY

Several carriers have filed petitions for reconsideration of the Commission's October, 1999 decision directing its e-rate program administrator, USAC, to seek reimbursement from carriers, functioning as vendors to e-rate program beneficiaries, whenever USAC commits e-rate funds that must later be reversed due to detection of errors or fraud. The problem with the Commission's chosen reimbursement mechanics is that they do nothing to provide appropriate incentives to the party best able to detect or prevent a fraud or mistake from doing so. The Order's absolute approach to holding a carrier financially liable, if not modified, will have a significant adverse impact on the resources carriers are willing to put into making the e-rate program work, thereby reducing the availability of a wide range of suitable services for schools and libraries.

Nextel agrees with the petitioners that the carrier-only reimbursement mechanism of the Order must be reconsidered as it is not supported by any factual, legal or policy basis. As an initial matter, it is far from obvious that the Commission's assumption that the Debt Collection Improvement Act applies at all to e-rate funds. Further, the Supreme Court precedent cited by the Commission as compelling reimbursement in fact is not applicable to the e-rate program. Thus, at the very least, with respect to non-statutory violations of Section 254, the Commission has broader discretion to fashion a remedy than the Order implies. Given the adverse impact the decision will have on the overall success of the program, the Commission should exercise its discretion on the collection of these disbursed funds in a fair and equitable manner.

Fundamentally, the Order appears to have misfocused on which entities are the program's actual beneficiaries. While the carrier performs a role of supplying the services

ordered from schools and libraries and is a conduit to the schools for the application of the service discounts, it is the schools and libraries, applying for and receiving program grants, that are the beneficiaries under the e-rate program. Requiring the service provider to reimburse USAC for a mistake or fraud by an educational institution improperly shifts the beneficiary's financial liability to an innocent vendor.

The harsh penalty the Order imposes on carriers is ill-considered in that it ignores general federal government guidelines on the scope of a vendor's responsibility under a grant program. It also fails to review the mechanics of reimbursement requirements of similar federal government grant programs such as the Pell Grant program. In the Pell Grant program, once the Department of Education has determined the eligibility of a student for federal financial assistance, the educational institution implementing the assistance is entitled to rely upon this determination. If later there is any problem related to the accuracy of the information submitted in the student's grant application, the Department of Education pursues reimbursement from the student and not the educational institution that functions as a funding conduit. This framework for dealing with applicant errors or fraud encourages universities to participate in the Pell program.

Here, the Commission has adopted, without analysis or public notice, a policy that leaves the program enforcement problems at the carriers' doorstep. Even if the Commission has no concerns about the impact of its decision on carrier's incentives to support the program, it cannot ignore the incentives it creates for potential applicants who know they may not be held accountable if they inappropriately receive discounted services. Additionally, the Commission cannot ignore that recovering funds from carriers does not actually reverse the discount that was incorrectly applied and as a result, the school or library might ultimately get

something for nothing. This is a case of unjust enrichment that the Commission has to address on reconsideration. Consistent with prior Commission statements that it intends to hold the party who has made the error or committed fraud responsible, the Commission has the authority to order USAC to seek reimbursement from that party.

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COMMENTS SUPPORTING PETITIONS FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), hereby files comments supporting the petitions for reconsideration filed by The United States Telecom Association ("USTA"), MCI Worldcom and Sprint on the Commission's October 1999 Order (hereafter the "*Adjustment Order*").[1] In that Order, the Commission directed its administrator, the Universal Service Administrative Company ("USAC"), to seek repayment of erroneously or illegally disbursed

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[1] Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, *Order*, CC Docket Nos. 97-21 and 96-45, FCC 99-291, 1999 FCC Lexis 5065, 17 CR 1192 (released October 8, 1999) (the "Adjustment Order"). On the same day the Commission issued another order waiving, for the first year of the program, the requirement of carrier reimbursement for those errors that did not constitute statutory violations. See changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, *Order*, CC Docket Nos. 97-21 and 96-45, FCC 99-292, 1999 FCC Lexis 5066, 17 CR 1195 (released October 8, 1999) (hereafter the "*Waiver Order*").

funds from service providers, rather than from the schools and libraries that apply to USAC to receive discounted services under the Commission's "e-rate" program.[2]

As discussed below, the Commission erred as a matter of law in automatically assuming that e-rate program funds are subject to the terms of the Debt Collection Improvement Act ("DCIA").[3] Even if the Commission reasonably could construe e-rate funding as appropriated U.S. Treasury funds subject to the DCIA, the Commission failed entirely to reconcile its decision holding carriers liable for over-committed funds with its prior statements that the beneficiary school or library is financially responsible for its own errors, fraudulent statements or for the misuse of services. Further, the Commission failed to provide any reasonable basis for holding carriers liable for a "debt" that is owed by the school or library. On reconsideration, the Commission should correct these errors. At the very least, the Commission must provide sufficient explanation of the reasons it believes it is legally constrained from collecting over-committed funds from the party who was in the best position to prevent the over-commitment.

Failure to review and modify the *Adjustment Order* will adversely impact the success of the e-rate program. If carriers are to be placed in the untenable position of not only administering the discount program, but having to become the ultimate guarantors against errors or fraudulent misuse of services, then there will be very few carriers that will go the extra mile to participate in and support the program with the allocation of internal company

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[2] Whenever funding commitments had been made to schools and libraries but the whole payment has not yet been made, the Commission directed USAC to cancel the existing funding commitment and deny any request for payment from service providers.

[3] 31 U.S.C. § § 3701 et seq.

resources. As a result, the intended beneficiaries of the e-rate program, i.e. eligible schools and libraries, will not have access to the variety of competitive telecommunications services available in today's marketplace.

As a carrier that has committed significant company resources to raising school and library awareness of its wireless service products that can enhance the educational experience, Nextel supports the goals of the program. However, if the Commission fails on reconsideration to take account of the serious legal and policy issues raised by the *Adjustment Order*, Nextel will have to reevaluate its ability to participate broadly in the program in light of this potentially significant unfunded liability the Commission is imposing on service providers. Other non-incumbent operators will be faced with the same choice, and the quality and range of services made available to eligible schools and libraries under the program will be significantly reduced.

To avoid this, the Commission should consider alternative discount recovery mechanisms that more closely align discount recovery responsibility with discount benefits: the party in the best position to control or correct an error or to prevent fraudulent use should be financially responsible for their error or fraud. In some cases, that may result in the service provider having to reimburse USAC, such as where the particular service provider is not, in fact, a "telecommunications carrier" as may be required under Section 254 as a condition of funding eligibility. In some cases, the program beneficiaries, the schools and libraries that apply for discounted services and certify that their use is consistent with Commission rules and USAC policies, would be called upon to return discounts they erroneously, or possibly fraudulently, obtained. As discussed below, such an allocation of responsibility is consistent with other federal agency beneficiary programs and has the positive effect of making all the

parties responsible for their own errors or misstatements, as the Commission originally envisioned.[4]

I. THE DEBT COLLECTION IMPROVEMENT ACT DOES NOT APPLY TO E-RATE PROGRAM FUNDS

Nextel concurs with the analysis in USTA's Petition for Reconsideration that the Commission erred in making the unexplained assumption that e-rate funds are U.S. Treasury funds appropriated by Congress and, as such, subject to the terms of the Debt Collection Improvement Act ("DCIA").[5] This results in a further unexplained assumption that, in all cases, there is a "debt," as that term is defined in the DCIA, that must be compromised or collected by the government whenever an error results in e-rate funds being committed in violation of Section 254 of the Communications Act or of the Commission's rules or USAC procedures.

E-rate funds are not general tax funds raised under Congress' taxing authority. In fact, courts reviewing Section 254's universal service assessments have concluded that the funding is not a tax.[6] USAC collects the funds disbursed under the program from service providers. Service providers must make "mandatory contributions" to the e-rate fund according to a

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[4] Nextel has participated in a group of concerned carriers that have provided the Commission with an alternative reimbursement proposal. Ex parte notice filed February 1, 2000 by USTA et al. in CC Docket 96-45 and CC Docket 97-21. Nextel urges the Commission to consider that proposal or other alternatives in preference to the draconian measures of the *Adjustment Order*.

[5] Petition for Reconsideration filed November 8, 1999 by United States Telecom Association ("USTA Petition") at 3.

[6] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999), *cert. denied sub nom,* Celpage, Inc. v. FCC, 120 S.Ct. 2212 (2000) (here after "*Texas PUC v. FCC*").

USAC-administered contribution factor formula based upon each provider's telecommunications revenues. Congress does not specify any program funding level or appropriate funding mechanism for the program. As a result, USAC, as an agent for the Commission, collects and distributes e-rate funding under direction from and pursuant to Commission rules. Funds that are incorrectly committed to applicants by USAC, or that are obtained based upon misstatements of eligibility status by a provider or an educational institution are not U. S. Treasury funds. They are funds collected by USAC on the Commission's behalf that are never commingled with U.S. Treasury funds. Fundamentally then, the e-rate program is a government grant program funded by assessments on carriers. While Nextel agrees that all parties should act responsibly in applying for and otherwise accounting for use of these funds, at base they are not U.S. Treasury funds that are covered by the terms of the DCIA.

Further, only government "debts" are encompassed by the DCIA. Under the DCIA, a "debt" or "claim" is any funds or property that an appropriate federal official has determined is owed to the United States by a person, organization, or any entity other than a federal agency.[7] In other words, an overpayment made by USAC is not a "debt" that the government is obligated to act to recover until the Commission or USAC, operating under specific Commission authority, determines that a specific amount is owed to the government. Thus, where there is an error in an e-rate funding decision that violates the provisions of Section 254, the Commission or USAC must specifically declare the amount of the debt owed. On the other hand, in the instance where there is an error in apparent violation of a Commission rule or

USAC procedure, rather than a violation of the bedrock terms of the statute, the Commission, at the very least, has the ability to waive its rules and under the express terms of the DCIA, to determine that there is *not* a "debt" that the government must collect.

The Commission plainly recognizes that it has far broader discretion to fashion an appropriate remedy whenever the error or mistaken reliance was based on a good-faith interpretation of Commission rules or the USAC "eligible services" list. On the same day as the *Adjustment Order,* the Commission issued its *Waiver Order*, that waived any repayment obligations for those situations that constituted non-statutory violations of Section 254. The Commission distinguished statutory and non-statutory violations by observing that Commission and USAC rules, procedures and implementing mechanisms are not specified in the statute. The Commission also recognized that "procedures that are not 'required by statute'," can be waived.[8] The Commission determined that it would be unfair to seek reimbursement of overpayments from carriers in the first year of the program, particularly given the level of notice USAC had provided and the inability of carrier vendors to determine whether an educational institution complied with Commission rules and USAC procedures absent notification from USAC. For the same reasons, the Commission has the authority to choose to waive over-commitments that result the mistaken funding of services that are not eligible pursuant to USAC's eligibility list. Where the over-commitment results from the violation of the statute, e.g. an ineligible applicant or an ineligible service provider, and the Commission

[7] 31 U.S.C. 3701 (b) (1).

[8] *Waiver Order* ¶ 6.

believes it cannot waive this over-commitment, it should seek recovery from the party best positioned to have known and/or prevented the erroneous e-rate commitment.[9]

The Commission needs to be aware that the status of eligible and ineligible services as contained in USAC's eligible services list is not a beacon of clarity. Many services are fundable only on a conditional basis, and USAC personnel often give conflicting informal opinions to carriers and applicants regarding the funding status of particular services and their uses within the educational environment. Nextel's own experience demonstrates that USAC processing personnel, reviewing funding requests, do not always apply the same criteria accoss the board, resulting in grants and denials of similar funding requests. Thus, the Commission should be very cautious in assuming that a carrier really is in the best position to know or prevent a program applicant from specifying a non-eligible service on its e-rate application.

For the reasons stated in these comments and the petitions for reconsideration filed on the *Adjustment Order*, Nextel believes that USAC's provision of the additional notice -- now contained in commitment letters to e-rate applicants from USAC -- that discount funding, once committed, can be reversed, begs the central question. Are carriers in the best position to detect program non-compliance by other parties? In the *Waiver Order*, the Commission justified its waiver by observing that carrier vendors are simply not in a position to determine whether an educational institution applicant has made an error or fraudulent statement that, if subsequently detected by USAC, could result in triggering a carrier's obligation to reimburse

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[9] In the *Waiver Order*, the Commission concluded that it had "no discretion to waive violations of [] statutory requirements." *Waiver Order* at 11, fn. 22. The Commission observed that carriers relying upon USAC and program applicant representations of service eligibility

USAC. This continues to be true whether or not USAC notifies carriers of the possibility that USAC may institute collection procedures against them for a school or library's mistake or wrongdoing. Such notice offers the carrier no avenue for preventing or correcting errors since it has no control over the application and grant process. The notice does nothing more than create a significant unfunded liability for those carriers participating in the e-rate funding.

II. CARRIERS CANNOT BE HELD ACCOUNTABLE FOR REIMBURSEMENT OF DISCOUNTS USAC MISTAKENLY COMMITS TO SCHOOLS AND LIBRARIES

The Commission's sole stated rationale for directing USAC to recover funds from carriers was that the carriers are currently the entities that USAC pays to make the carrier whole after the carrier has provided eligible institutions with discounted service. As the Commission previously noted, however, the reimbursement to carriers rather than to eligible institutions is merely for the "administrative ease" of these institutions that would otherwise have to pay the carrier's full invoice price for services rendered and then later have the discount refunded to it by USAC.

It is not obvious from the *Adjustment Order* whether the Commission believed that it is somehow compelled by any aspect of the Communications Act to seek repayment from carriers rather than the e-rate program beneficiaries. If there is such a belief, it is misplaced.

were in a materially different position than vendors who know, or should have known that they were not eligible for telecommunications services support.

There is no support in the Communications Act for holding carriers responsible for USAC errors, or errors, misrepresentations or misuse by e-rate program beneficiaries.[10]

A. The *Adjustment Order* Misunderstands the Carrier Role As Conduit, Not Program Beneficiary

Section 254(h)(1)(B) of the Communications Act requires that any telecommunications carrier provide, upon a *bona fide* request, services for educational purposes to elementary and secondary schools, and libraries at discounted rates.[11] Carriers are entitled under the Act to either: (i) receive reimbursement using the support mechanisms in place, or (ii) have the amount of the discount treated as an offset of their obligation to contribute to the universal service support mechanism.[12] The Act's legislative history confirms that the program is intended to ensure that is intended beneficiaries - - schools and libraries nationwide - - have affordable access to modern telecommunications services.[13] The willing participation of carriers is of critical importance to the proper functioning of the program. Indeed, Section 254(h)(1)(B) establishes an enforceable substantive guarantee of a statutorily-based system of

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[10] Nextel believes, however, that it is reasonable to hold service providers financially responsible if they are not eligible to provide service under the program as they are in the best position to determine their individual eligibility.

[11] Services with an "educational purpose" are included in the definition of universal service under section 254(c)(3) of the Act.

[12] 47 U.S.C. 254(h)(1)(B).

[13] *See* H.R. Conf. Rep. 104-458 at 132 (1996) reprinted in 1996 U.S.C.C.A.N at 144.

reimbursement that provides assurance that carriers will receive compensation for the services they render to program beneficiaries.[14]

While the *Adjustment Order* does not examine in any detail the distinctly different responsibilities of service providers and program beneficiaries, there are many indications in the Communications Act and the Commission's rules that service providers were not intended to be "enforcers" of the program or guarantors of other parties' compliance with program guidelines. Nevertheless, rather than directing USAC to collect funds from the parties that may have committed innocent or deliberate errors, or from parties that misstated their program eligibility or misused services in a manner that renders them ineligible, the *Adjustment Order* puts carriers in the untenable position of reimbursing USAC for a range of errors that may well have been caused by either the program administrator or by the program's beneficiaries.

It is important to note that neither the Act, nor the Commission's e-rate rules, nor any other Commission order imposes any specific program compliance accountability on service providers.[15] The Commission's seminal decision creating the e-rate program, the *USF Order*,

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[14] 47 U.S.C. 254(h)(1)(B). " A telecommunications carrier providing service under this paragraph shall (i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service." Courts already have reached the conclusion that those who provide their services under statutory financial assistance programs form an integral part of the statutory scheme and have a property interest in reimbursement for the services they rendered in reliance on the compensation provisions of such programs. *See Brooklyn School for Special Children v. Crew,* 1997 WL 539775 (S.D.N.Y. August 28, 1997).

[15] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order,* 12 FCC Rcd 8776 (May 8, 1997) ("*USF Order*"). In the *Adjustment Order*, the Commission has determined for the first time that the funds disbursed to support eligible schools and libraries will be subject to reimbursement by service providers. Of course, before

for example, states that the service providers' involvement in the program is limited to fulfilling purchase orders from the schools.[16] Acknowledging Congress' intent to require accountability on the part of schools and libraries, the Commission specifically imposed several measures for the independent review of the schools and libraries' applications and technology plans designed to show the use they intended to make of the services that carriers would provide to them.[17]

No corresponding measures were imposed on carriers. Simply because the program directs service providers, rather than the schools and libraries, to seek reimbursement from USAC does not transform carriers into beneficiaries of the program. The carriers have already provided a service to schools and libraries for which they are seeking compensation. The benefit has been conferred on the school or library, and the fact that USAC makes a direct

promulgating a rule, an agency is required to publish general notice of its proposal in the Federal Register, unless those subject to the rules are actually named and either personally served or have actual notice. Therefore, the Commission should have acted only after following the proper rulemaking procedures.

[16] *Id.* at 9006, ¶ 431. *See also, Texas PUC v. FCC*, at 445. The Commission's decision to allow schools and libraries to obtain supported discounts on all commercially available telecommunications services was intended, the court said, "to maximize the schools and libraries' flexibility to *purchase* whatever package of services they need." (emphasis added).

[17] *USF Order*, 12 FCC Rcd at 9076, ¶ 570. Because of the complexity of the technological needs of schools and libraries, the Commission required the appointment of a subcontractor, USAC, that would exclusively manage the application process for schools and libraries. *USF Order*, 12 FCC Rcd at 9076-77, ¶ 571. Under the rules, schools and libraries are required to comply with strict self-certification requirements in all Commission applications, designed to ensure that only eligible institutions receive support.

payment to the carriers is, as the Commission stated, simply a means of eliminating the schools as middlemen for "administrative ease."[18]

In fact, when the Commission first implemented the program, it specifically rejected commenters' suggestions that it should establish program guidelines identifying eligible services consistent with Section 254's statement that funding should be available to services with "educational purposes." Parties argued that such guidelines would assist all parties in administering the program as well as prevent fraudulent use by schools and libraries of discounted services.[19] The Commission stated at that time that this step was unnecessary because it already had sufficient remedies against offending schools and libraries. For example, the Commission noted that the application certification requirements and the potential civil and criminal liability faced by the person authorized by a school or library to order the services were sufficient to avoid fraud and misuse.[20] Yet, by abruptly shifting all financial

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[18] *USF Order*, 12 FCC Rcd at 9083,¶ 586.

[19] *USF Order*, 12 FCC Rcd at 9079-80, ¶ 578. As a result, carriers, who do not even participate in the discount application process, have no particular guidance as to the services that qualify under the program. The list of "eligible services" established by USAC also is evolving and contains many services that are "conditionally" eligible for discount funding. The Commission is free to designate additional eligible services. In *Texas Office of Public Utility Counsel v. FCC*, the court observed that, by using the word "designate" in section 254(c)(3), Congress could have meant for the FCC to authorize a broad class of services. *Texas PUC v. FCC*, 183 F.3d at 445. This makes it even more difficult for carriers to know which services are eligible under the program and even more necessary for them to be able to rely on USAC's funding commitments. In fact, the Commission recognized in its *Waiver Order* that providers had reasonably relied on the funding commitments applicants had received from USAC. *Waiver Order* at ¶7.

[20] *USF Order*, 12 FCC Rcd at 9079-80, ¶ 578.

responsibility to the carrier, the *Adjustment Order* takes the opposite approach by relieving applicants of all liability for mistakes and, potentially, abuse of the e-rate program.

The Commission also has stated that it maintained jurisdiction over schools and libraries, pursuant to sections 502 and 503(b) of the Act, which authorize it to impose a forfeiture penalty on any school administrator who violates the rules and regulations issued by the Commission. Further, the Commission announced that it would, in consultation with the Department of Education, engage and direct an independent auditor to conduct random audits of schools and libraries to determine whether its support policies require adjustment.[21] These are obvious indications that the *Adjustment Order* represents a complete and unexplained departure from prior stated Commission intentions to hold schools and libraries accountable for their mistakes or potential misuse of services for ineligible, non-educational purposes.

Other statements likewise demonstrate that the Commission was and is well aware that carriers should not be the financially accountable party under the e-rate support program and that the Commission has no authority to pursue enforcement actions against carriers.[22] Even in

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[21] *Id.* at 9081, ¶ 581.

[22] In the *Waiver Order*, for example, the Commission appropriately recognized that service providers were not in a position to monitor the school's compliance with the applicable regulations and could not have known of any potential problem absent notification by USAC. The Commission recently affirmed the responsibility of schools and libraries in submitting accurate information along with their applications. *See, e.g.* In the Matter of Request for Review of the Decision of the Universal Service Administrator by Scranton School District, Scranton, Pennsylvania, Federal-State Joint Board on Universal Service, *Order*, File No. SLD-112318, CC Docket Nos. 96-45 and 97-21, DA 00-20, at ¶ 8 (released January 7, 2000). " We find that it is administratively appropriate to require an applicant to be responsible for correctly calculating and reporting its estimated pre-discount costs in completing its FCC Form 471 upon which its ultimate funding is dependent." *See also* Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Brooklyn, New York,

directing USAC to seek recovery of disbursed funds from service providers when the disbursement of these funds was made in violation of the Commission rule-based eligibility requirements, the Commission implicitly recognized that program compliance responsibility rests almost entirely on the schools or libraries.[23]

B. The *Adjustment Order* Misapplies Legal Precedent

The *Adjustment Order* also relies on the inapposite Supreme Court precedent of *OPM v. Richmond*[24] to come to the conclusion that USAC is compelled to recollect funds when the payment is made in violation of a the Communications Act. *OPM v. Richmond's* holding is quite narrow, applying only to payments of money from the federal Treasury that are authorized by statute pursuant to the constitutional appropriation clause. Unlike Richmond's claim in *OPM v. Richmond*, the issue here is not about the payment of benefits from a fund appropriated by Congress. Rather, the issue is about the *reimbursement* of funds erroneously disbursed or the repayment of funds that once were committed from *a non-appropriated, non-Treasury* fund.

At most, *OPM v. Richmond* can be read to suggest a governmental responsibility to recover erroneously-committed funds from program *beneficiaries* that have violated *statutory*

Federal-State Joint Board on Universal Service, File No. SLD-105791, *Order*, CC Docket Nos. 96-45 and 97-21, FCC 00-2 at ¶15 (released January 7, 2000).

[23] In the *Waiver Order*, the Commission observed that the USAC funding commitment letter has been revised to provide notice of the possibility of carrier reimbursement. However, the revised letter also confirms that it is the applicants, *i.e.* the schools and libraries, which receive funding commitments from the USAC, contingent on *their* compliance with all statutory, regulatory and procedural requirements of the program.

eligibility requirements. Nextel has no argument with the government taking appropriate steps to recover erroneously-committed funds from program beneficiaries, but carriers are not the intended program beneficiaries under the e-rate program. Further, most carriers have neither committed any "wrongdoing" for which they should be penalized nor are they in a position to detect or correct other parties' "wrongdoings" or errors.[25]

Accordingly, *OPM v. Richmond* does not provide any legal basis for the Commission to direct USAC to cancel its existing commitments after service providers have already supplied services under the e-rate program, nor does it provide any legal basis for seeking reimbursement from carriers, who are not the intended beneficiaries of the program. Thus, on reconsideration, the Commission must direct USAC to recover funding from the beneficiary entities once it has determined that there was no funding entitlement. Anything less is a half measure that fails to accomplish the reversal of a discount that was incorrectly supplied or fraudulently obtained.

The *Adjustment Order* also failed to address other court precedent that supports carriers' entitlement to payment for services they have rendered under the e-rate program. In *Arizona v. United States*,[26] the State of Arizona was seeking reimbursement of its costs incurred in

[24] Office of Personnel Management v. Richmond, 496 U.S. 414, *reh'g denied*, 497 U.S. 1046 (1990).

[25] In the case the Commission relied upon, Richmond was a beneficiary of disability benefits who was seeking the payment of a disability benefit from the Civil Service Retirement and Disabilities Fund after his own action had caused him to temporarily lose his right to that particular statutorily-based benefit.

[26] *Arizona v. United States*, 494 F.2d 1285 (Ct. Cl. 1974).

connection with the removal and relocation of utility plant conduit to accommodate the construction of a federal highway under a statute that authorizes the use of federal funds to reimburse states for costs of utility relocation due to federal highway construction. The Federal Highway Administration ("FHA") initially approved the state project to relocate its gas conduit, but later reversed itself. The court found that Arizona had complied with all the statutory conditions of the program and held that the federal government had a contractual obligation to pay the state its proportionate share of the relocation costs because of the FHA's prior approval of the project. The federal government argued that reimbursement was not required because the utility's permit allowed the state to terminate the permit at the state's discretion. The court rejected the federal government's argument, finding that it would have improperly imposed a condition for the payment of federal funds beyond the two conditions explicitly imposed by statute.

Carriers providing services in the e-rate program are in a comparable situation to Arizona. Their compensation under the statute is attached solely to their provision of services to the schools and libraries and the submission to the USAC of their invoice for such services, reflecting that they have charged the lowest comparable price charged to other similarly-situated customers. Having met these conditions, carriers are entitled to payment.

III. CARRIERS PARTICIPATE IN THE PROGRAM AS THIRD PARTY VENDORS

Carriers' participation in the program is limited to fulfilling purchase orders from the schools, as the *USF Order* correctly acknowledged.[27] While carriers that serve particular

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[27] *USF Order*, 12 FCC Rcd at 9006, ¶ 431.

geographic areas must respond to a *bona fide* request for provision of eligible services under the program, there is nothing in the statute that compels providers to dedicate specific internal resources to support schools or engage in school-specific marketing to make them aware of services they may find to be particularly useful. On reconsideration, the Commission should analyze the nature of the carrier's participation in the program and confirm they are vendors as that term is used in government-wide guidelines.

The Office of Management and Budget ("OMB") maintains advisory circulars applicable to federal agencies in the context of other federal government award programs that are instructive in this regard. These advisory circulars set forth the uniform standards federal agencies must apply to non-federal entities that receive federal awards.[28] Under section 105 of the Circular No. A-133, a "vendor" is a "dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a federal program. These services or goods may be ... for the use of beneficiaries of the federal program."[29]

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[28] *See* OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations, revised June 24, 1997.

[29] *See* Section 105 of Circular No. A-133. *See also,* Section 210(c) of the OMB Circular No. A-133 listing the characteristics of a buyer/vendor relationship. A payment is a payment for goods or services supplied by a vendor "when the organization: (1) Provides the goods and services within normal business operations; (2) Provides similar goods or services to many different purchasers; (3) Operates in a competitive environment; (4) Provides goods or services that are ancillary to the operation of the Federal program; and (5) is not subject to compliance requirements of the Federal program." The Circular specifically states that, when making a determination of whether a person is a vendor or a subrecipient of funds, it is not required that all these characteristics be present and reasonable judgment should be used in making that determination.

In general, the scope of a vendor's program compliance responsibilities are to make their records accessible for audits.[30] Thus, as a general matter, the OMB does not pass program compliance responsibility on to vendors as opposed to program beneficiaries.

E-rate service providers have all the critical characteristics of "vendors" under the terms of the OMB circular: they supply services to schools and libraries that benefit from the program. These services are essential for the educational goals the program promotes. However, their responsibility, as enunciated by the Commission, is limited to ensuring that the prices service providers offer to the schools and libraries match the lowest corresponding rates for similarly-situated customers. Further, as the Commission is aware, carriers have no obligation to provide any data in support of the schools' applications for funding and do not have to apply themselves for eligibility under the program prior to entering into a purchase agreement with the schools.[31] In fact, the Commission recently made plain that over-

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[30] OMB Circular No. A-133, § 210(f). Section 210(f) provides that "[i]n most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment of goods and services comply with the laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements." Under section 105 of the Circular, the "auditee" is the non-Federal entity that expends Federal awards.

[31] Whether carriers receive payment from a school and USAC rather than just from a school has no impact on the legal relationship of the third-party vendor to the program administrator.

involvement of a service provider-vendor in a school's application process could result in disqualification of the applicant school.[32]

In the context of other government support programs, the government does not bring suit against persons qualifying as "vendors" to obtain the reimbursement of government funds that beneficiaries of the support program used to pay these vendors for services rendered to them. Nextel urges the Commission to exercise this same restraint and not direct USAC to bring action against innocent vendors that merely provide the services that schools and libraries specify.

IV. OTHER FEDERAL SUPPORT PROGRAMS DO NOT HOLD THE SERVICE VENDORS LIABLE FOR BENEFICIARY FRAUD OR MISTAKES

In dealing with the mechanics of reimbursement, the *Adjustment Order* failed to consider the precedent available from other government support programs that service vendors have a reasonable expectation to receive payment for services provided in compliance with their engagements, like any other provider engaged in government support programs has a property interest in the payment of its services. This is true whether the provider is or is not the intended beneficiary of the program.[33]

For example, the U.S. Department of Education (the "Department") administers the federal Pell Grant program, which provides grants directly from the federal government to

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[32] See In the matter of Request For Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, *Order*, File No. SPIN-1433006149, CC Docket No. 96-45, FCC 00-167 (released May 23, 2000).

[33] *Furlong v. Shalala*, 156 F.3d 384, 393 (2d Cir. 1998) citing *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984), *White Plains Nursing Home v. Whalen*, 53 A.D.2d 926 (N.Y. App. Dir. 1976), *aff'd*, 366 N.E.2d 79 (N.Y.1977).

statutorily eligible, financially needy students enrolled in eligible education programs offered at eligible institutions of higher education.[34] The fund disbursement mechanics of the Pell Grant are similar to those of the e-rate program. Universities act as conduits for disbursing grants from the Department to the eligible students.[35] As the first step to receiving a Pell Grant, a student must apply to the Department on an approved application form. The Department provides each institution designated by the student with an "institutional student information record" ("ISIR") which includes the student's personal information and the amount which the student's family may be reasonably expected to contribute towards the student's education. In determining a student's eligibility to receive a Pell Grant, the university is entitled to assume that the ISIR information received from the Department is accurate and complete. The institution calculates and credits each eligible student's account with the Pell Grant it has received from the Department, in accordance with payment schedules published by the Department. Or, under the "reimbursement payment" method, the institution first credits the student account for the amount of the grant and, upon submission of a supporting documentation to the Department, the eligible institution receives from the Department either a reimbursement for the Pell Grant funds awarded and disbursed to eligible students, or an offset against the amount of Pell Grant funds the school, for any reason, owes to the Department.

The Department regulations do not hold educational institutions liable for repayment of any overpayments of federal Pell Grant funds to students unless the institutions themselves have committed some sort of "wrongdoing" by not complying with the Department rules and

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[34] The federal Pell Grant Program regulations are codified in 34 C.F.R. Part 690.

[35] *See Trustees of the California State University v. Riley*, 74 F.3d 960 (1996).

regulations governing the program.[36] The student, not the university, is responsible for returning any overpaid Pell funds to the Department.[37] When a school loses its eligibility in the course of an award year, eligible students attending the institution and who filed a valid application before the institution became ineligible still are paid Pell Grants for payment periods that the students completed before the institution became ineligible and the payment period in which the institution became ineligible. The institution receives payment from the Department for any Pell funds the university has appropriately credited or disbursed to the students for those payment periods.

Applying Pell Grant principles to the e-rate reimbursement mechanics, the Commission could not order reimbursement by the carriers of funds they have received in compensation for the provision of the required services to the schools and libraries. Nor could the Commission order its administrator to cancel its existing commitments, upon which carriers have relied, to provide services to schools and libraries. Errors or fraud for which the schools, rather than the carriers, are responsible would not trigger a carrier reimbursement responsibility. Carriers would be entitled to keep the funds they received in compensation for the services already provided, regardless of the reasons upon which the Commission or its program administrator

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[36] *See* 34 C.F.R. § 690.79.

[37] In at least one case, the Department decided that a school paying Pell Grants to students who were contemporaneously receiving other Pell Grants at other institutions had no way of knowing of these concurrent payments because the students did not inform the school that they were simultaneously enrolled in other schools. The Department decided not to penalize the school for the misconduct of its students of which the school could not have been aware. *See,* In the Matter of Jesode Hatorah, 1996 WL 1056642 (E.D. Ohio March 5, 1996).

would base its request for reimbursement. Further, carriers should be paid for the services rendered and not yet paid.[38]

V. THE COMMISSION HAS A CONTRACT WITH THE BENEFICIARY SCHOOLS AND LIBRARIES WHICH IT IS ENTITLED TO ENFORCE

While it is impossible to discern from the *Adjustment Order* itself, it is possible that the Commission believes it has greater jurisdiction over carriers pursuant to the Communications Act than it does over e-rate program beneficiaries. This cannot be the case. If it were, then none of the Commission's rules directing beneficiary compliance are enforceable. Nextel agrees with the Commission's prior analysis that it maintains full Section 502 and Section 503 jurisdiction over program beneficiaries.

Before receiving any funding commitments, schools and libraries are required to comply with strict self-certification requirements in their applications designed to ensure that only eligible entities receive support.[39] They also must prepare specific plans for using their chosen technology.[40] Services must be obtained through the use of competitive bidding and copies of the school contract with service providers sent to USAC for approval of the school or library purchase order.[41]

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[38] This is not meant to suggest that the Commission should not pursue reimbursement – only that the program beneficiary is the appropriate party from whom to seek reimbursement except in the case of carrier wrongdoing.

[39] *USF Order*, 12 FCC Rcd at 9002, ¶ 425 and 9079, ¶ 577.

[40] *Id.* at 9077, ¶ 573.

[41] *Id.* at 9080, ¶ 580.

These various steps educational institutions go through demonstrate that if schools and libraries receive a funding commitment from USAC, they have a relationship with the Commission and USAC as its administrator comparable to a contractual relationship. The Commission, directly or through its administrator, thus is entitled to take actions against the schools that violate their commitments under the Commission policies, rules and published USAC procedure as well as under general contract law.

VI. CONCLUSION

Nextel supports the e-rate program and the pending petitions for reconsideration of the *Adjustment Order*. The *Adjustment Order* represents an unexplained and unjustified departure from the Commission's prior recognition that program beneficiaries are responsible for their own mistakes or fraud on the program. Similarly, where USAC mistakenly grants an application, the beneficiary of that grant should be responsible for paying back that commitment. Any conscious Commission policy that disregards other federal grant policy precedent and holds the service provider vendor responsible for reimbursing the program will have a serious adverse impact on the well-being of the program. Service providers will be discouraged from participating in the program, and potential applicants will be deprived of access to a wide variety of competing telecommunications services – contrary to Congress' intentions for the e-rate program. Nextel urges the Commission to order USAC to complete the

cycle of recovering money wrongfully paid out of the program, not by stopping at the service vendor which acted as nothing more than a conduit between USAC and the applicant, but by reversing the discount at the level of the program beneficiary.

Respectfully submitted,

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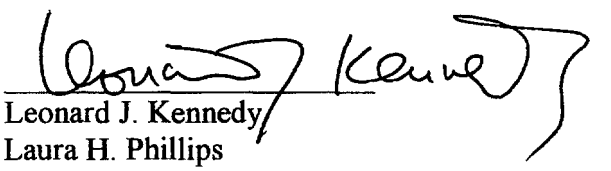

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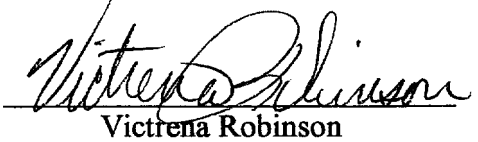
CERTIFICATE OF SERVICE

I, Victrena Robinson, a secretary at Dow, Lohnes & Albertson, do hereby certify that on this 3rd day of August, 2000, I served a true copy of the foregoing Comments, via First-Class Mail, Postage Prepaid, on the following:



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